



REPUBLIC OF KENYA



KENYA LAW
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**Jojomera & another v Kauli (Land Case E013 of 2022)
[2023] KEELC 19308 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E013 OF 2022**

**AE DENA, J
JULY 31, 2023**

BETWEEN

CHAKA MTWANA JOJOMERA 1ST PLAINTIFF

MAKANGA DZITU MWEMBE 2ND PLAINTIFF

AND

EDWARD SHIDA KAULI DEFENDANT

RULING

1. The firm of Mutanu & Co Advocates filed the application subject of this ruling vide a certificate of urgency dated January 31, 2023 on behalf of the defendant/applicant. According to the applicant, this court vide its ruling delivered on August 1, 2022 issued restraining orders against the applicant upon being misled by the plaintiff's who failed to intimate to court that the suit property in this matter is a family home of the Mwabeja Clan, the applicant included. It is averred that the property is inhabited by over 30 families and who will be dispossessed off the land in the event that the injunction orders issued by the court are enforced.
2. The applicant consequently seeks that the orders issued on August 1, 2022 are discharged and or varied set aside, pending the hearing and determination of this application and the main suit together with costs.
3. The application is premised on the grounds that the defendant was served with orders issued on August 1, 2022 on December 2, 2022 restraining him and any other persons acting on his behalf from alienating, selling, transferring, erecting, constructing, finishing any construction, renovating the house or any structures in all that parcel of land known as Samburu/Kigombero area Matopeni within Kwale County. That the application proceeded exparte and led to the plaintiff/respondents misleading the court on the actual size of the suit property and its occupation.



4. The application is supported by an affidavit sworn by the applicant Edward Shida Kauli. It is averred that he has been in occupation of the suit property with his clan members for more than 80 years and have permanent structures including graves. That there has been an earlier suit where the plaintiff therein claims ownership of the suit property (Kwale Land Case No 71 of 2018 Francis Rumba Mnyika Versus Edward Shida Kauli & Another).
5. The applicant denies the trespass allegations and states that in 2012 a boundary dispute pitting the Mwadzime and Mwabeja Clan where the respondent and applicant respectively hail from was resolved by elders in favor of the later. The applicant states that it is in the interest of justice that the orders issued on August 1, 2020 be set aside and he be allowed to file a response to the application.
6. The application is opposed by the replying affidavit sworn by the 1st plaintiff/respondent Chaka Mtwana Jojomera. It is averred that the court upon being satisfied with service of the documents as well the material placed before it issued the orders of injunction. It is averred that the applicant has not placed on record relevant documents to warrant the discharge of the temporary orders of injunction to wit any documents showing that he has a right to trespass and/or do anything on the suit property. The respondents pray that the application is dismissed with costs to the plaintiff.

Submissions

7. The application was canvassed by way of written submissions.

Applicant's Submissions

8. The applicant's submissions were filed on April 17, 2023. It is submitted that discharge and varying of orders is discretionary to be exercised judiciously. The court is referred to the provisions of section 3A of the [Civil Procedure Act](#) on the inherent powers of the court and order 40 rule 7 of the [Civil Procedure Rules](#) on when an injunction may be discharged, varied or set aside.
9. Further reference is made to the case of [Walter Mbugua Ndungu & Another Versus Njogu Omani](#) [2015] eKLR where it was held that exceptional circumstances such as non-disclosure or concealment of material facts were grounds for setting aside, varying orders. That the respondents misled this court on the actual size of the suit property and extent of its occupation. That to the contrary the applicant and members of his clan have lived on the suit parcel for over eighty years and have erected structures thereon. The based on these facts, the application is merited and the orders issued on August 1, 2022 ought to be set aside, varied and or discharged. The applicant further seeks to be awarded costs of this suit.

Respondents Submissions

10. The respondents submissions were filed on May 25, 2023. It is submitted that the applicant was served with the court orders of August 1, 2022 and having failed to respond faults the decision of the court. That the reasons advanced by the applicant on the failure to respond to the application cannot be termed as a serious enough. That the applicant has further not demonstrated the prejudice or damages they are likely to suffer if the injunction remains in force. The court is referred to the case of [Ocholla Kamila Holdings Ltd Versus Guarnas Bank Ltd](#) [2015] eKLR where the circumstances as to when to or not to discharge an interlocutory injunction are enunciated. That based on this decision it had not been demonstrated that the injunction has been used in any way adverse to the defendant. The respondent prays that the application is dismissed with costs.



Determination

11. The issue that commends determination is whether the orders issued on August 1, 2022 should be discharged.
12. The application is substantively grounded on order 40 rule 7 of the [Civil Procedure Rules, 2010](#) which provides that; -

Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.

13. The setting aside of injunctive orders therefore is a discretion of the court based on the circumstances outlined by the party dissatisfied with the order. It is trite discretion must be exercised judicially. What then are some of the principles that the court should deploy in interrogating the reasons advanced by an applicant aggrieved by an order of injunction to warrant such discharge or variation? In the case of *Walter Mbugua Ndungu & Another Versus Njogu Omani (supra)* Justice Sila Munyao stated as follows; -

"I do not think order 40 rule 7 exists so as to aid a party who was otherwise served with the application for injunction, but who by design or neglect, failed to appear in court to defend the application. There should exist exceptional circumstances before recourse may be had to the provisions of order 40 rule 7. In my view one of the exceptional circumstances that may exist, is where it is discovered that there was non-disclosure of material facts, which facts were not brought to the attention of the court. If there is evidence that there was a distortion of material facts, or a concealment of material facts, which led to the grant of the order of injunction, the conscience of the court may be pricked so as to set aside the order of injunction. But again the applicant must show that he did not have opportunity to avail these facts during the inter partes hearing of the application for injunction, or that such facts were not within his knowledge at that time and could not reasonably have been expected to be within his knowledge despite the exercise of due diligence"

14. In the case of [Kenya Electricity Transmission Company Limited v Kibotu Limited](#) [2019] eKLR, MA Odeny J further espoused on inter alia the principle of non-disclosure as follows; -

"The other issue that is relevant to this case is whether the plaintiff obtained the interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts. The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows:

- a) The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
- b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.



- d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.
- e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- f) Finally, it is not every omission that the injunction will be automatically discharged"

15. I will proceed to interrogate the issues based on the principles set out in the two authorities above.
16. The matter was first placed before me *ex parte* in chambers on March 14, 2022. I declined to certify the same urgent and ordered that service be effected upon the respondent. On April 5, 2022 when the matter came up for hearing of the application after service, Counsel for the plaintiff/respondent Mr Otwere indicated that service had not been effected upon the defendant (who is the applicant in herein) had become evasive. The court ordered for service to be effected and for the matter to be mentioned for confirmation of service on May 11, 2022. On May 11, 2022 Mr Otwere confirmed that service had been effected upon the defendant personally and sought that prayer 1 of the application is granted. The court guided by the affidavit of service on record in confirmation of service ordered for the application to be dispensed by way of written submissions which order was complied with. In its ruling delivered on July 20, 2022 the court allowed the application and granted temporary orders of injunction against the defendant pending the hearing and determination of the suit.
17. The applicant states that the reason for his failure to respond was that he could not afford to procure the services of an advocate for representation. Am not sure whether to term this as ignorance of the law and procedures of the court or blatant negligence and disinterest in pursuing the matter especially after service. For the defendant/applicant to be served with pleadings and not show any interest until after service of the injunctive orders, it is in my opinion indolence of the highest order. As stated by the maxims of equity, the vigilant are aided and not the indolent. I would under these circumstances then agree with the dictum of Munyao J above that order 40 rule 7 does not exist to aid a party who was otherwise served with the application for injunction, but who by design or neglect, failed to appear in court to defend the application.
18. I will now proceed to interrogate whether there any special circumstances to compel this court to exercise its discretion in favor of the applicant.
19. It is stated by the applicant that there was non-disclosure of material facts. That the respondent misinformed the court on the actual size of the suit property and further that incomplete evidence was adduced on alleged occupation of the suit property including the existence of Kwale Land Case No 71 of 2018 Francis Rumba Mnyika Versus Edward Shida Kauli. I will quickly dispense with the alleged failure to disclose the existence of Kwale Land Case No 71 of 2018 Francis Rumba Mnyika Versus Edward Shida Kauli. The pleadings were not availed to this court by the applicant. The best approach would be to deal with the issue during pretrial directions and consider consolidation, stay including joinder of other parties if found necessary.



20. But having stated this it behooves this court to interrogate whether the facts allegedly not to have been disclosed are of sufficient materiality to justify or require immediate discharge of the order without examination of the merits. How important they were to issues which were to be decided by the judge in the application. Let me first state that based on the depositions and evidence in the supporting affidavit to the application dated March 2, 2022 the court was satisfied the threshold set out in the case of *Giella Vs Cass man Brown* on grant of orders of injunction had been met by the applicant, the respondent in the present application.
21. About the actual size of the suit property and from the material placed before this court both parties state the suit property is approximately 200 acres. I have seen the photographs annexed by the applicant and which show several households as well as graves allegedly belonging to the defendant and his clan. To what extent does this information support the present application and was the plaintiff obliged to disclose it? A look at the Plaint shows the suit is brought against the defendant in person and not on behalf of the clan he belongs to. However, at paragraph 8,9 and 10 the claim takes a wider trajectory and refers to erected structures, houses or dealing in any manner with the entire suit property. Clearly then in my view disclosure of the extent of occupation became material. By and large the plaintiff appears to have been very economical with issues surrounding the property which ought to have been disclosed as a matter of good faith. The orders would not have issued in the way they issued specifically the underlined portion had the fullest disclosure been made.
22. The impugned orders read thus; -
- "That a temporary order of injunction hereby and do issue restraining the defendant by himself his authorised agents, employees, representatives, servants and or other persons acting on his behalf from alienating, selling, Transferring, erecting, constructing, finishing any construction, renovating the house or any structures in all that parcel of land known as Samburu/Kigombero Area Matopeni within Kwale County measuring approximately 200 acres pending determination of this suit."
23. The above affects other people not party to the suit and which would also cause injustice to them having not been heard. I find support in the case of *St Patricks Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, where the court stated as follows; -
- "Similarly, this court has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. Questions such as whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain will be asked when considering an application to discharge an injunction."
24. The applicant has annexed several photographs in evidence of occupation of the suit property by not only him but allegedly several other persons. The defence filed on 13/02/23 also raises pertinent issues as to ownership including the two clan factors. Issues to do with occupation of the suit property and its ownership can only be determined after hearing the matter by way of *viva voce* evidence. It cannot be established at this particular moment as to who is in actual occupation of the suit property and the nature and extend of such occupation. It is trite that the objective of interlocutory injunction is to preserve the suit property and in view of the competing interests.
25. To enable dispensation of substantive justice, preservation of the suit property, the orders earlier issued on July 20, 2022 shall be discharged and varied in the following terms; -



1. That pending further orders of this court, in order to maintain the *status quo* for purposes of preserving the suit property both the defendant and plaintiff by themselves, their authorised agents, employees, representatives, servants and or other persons acting on their behalf are hereby restrained from selling, transferring, undertaking any further construction of a permanent nature in the parcel of land known as Samburu/Kigombero Area Matopeni within Kwale County.
2. I shall not make any orders as to costs based on the findings against both the parties.

It is ordered.

DELIVERED AND DATED AT THIS 31ST DAY OF JULY,2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Otwere for the Plaintiff/Respondent

Mr. Musyoki for the Defendant/Applicant

Court assistant: Disii

